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Nos. 93-517, 93-527 and 93-539

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Writ Of Certiorari
To The New York Court Of Appeals

BRIEF *AMICI CURIAE* OF THE NEW YORK STATE UNITED TEACHERS, AFT, AFL-CIO AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

INTEREST OF THE *AMICI CURIAE*

The New York State United Teachers (hereinafter "NYSUT") is a federation of over 800 local employee organizations which are organized and exist pursuant to the New York State Public Employee's Fair Employment Act (N.Y. *Civil Service Law* Article 14) (McKinney's 1983). NYSUT's statewide membership exceeds 330,000 public employees. The vast majority of NYSUT's membership is comprised of the professional teaching and support staff employed within the approximate seven hundred and fifty public school districts situated throughout New York.

The American Federation of Teachers, AFL-CIO (hereinafter "AFT") is a national labor union affiliated with the AFL-CIO and the parent organization of various state affiliates, including NYSUT. The AFT represents over 800,000 members who work in public elementary and secondary schools, community colleges and universities, state government and health care. The vast majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools.

Pursuant to Rule 37 of the Rules of this Court, and the stipulation previously entered between petitioner and respondents, the respondents have consented to the submission of the present brief *amici curiae* by NYSUT and the AFT. Respondents' letter consenting to such filing has been simultaneously submitted with this brief.

SUMMARY OF ARGUMENT

Chapter 748 of the Laws of 1989 (McKinney's 1989 Session Laws of New York 1989, Vol. 2)[1] established a separate and independent union free school system for the Village

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[1] Chapter 748 reads, in pertinent part, that:
Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange County, on the date when this act shall take effect, shall and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of the union free school under the

of Kiryas Joel, a religious enclave consisting exclusively of approximately 8,500 Hasidic Jews of the Satmar sect. *Grumet v. Board of Education*, (Pet.App. 3a),[2] 81 N.Y.2d 518, 601 N.Y.S.2d 61, 63 (1993). Given the facts, circumstances and litigation leading up to and resulting in the legislative passage of Chapter 748, *amici* urges the Court to conclude that the legislation violates the purpose, primary effects and excessive entanglement components of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); and, thus, contravenes the Establishment Clause of the First Amendment of the *Constitution*. Moreover, since Chapter 748 extends a religious-based denominational preference exclusively to the Satmar Hasidic community of Kiryas Joel, in the form of according to it its own public school system, that legislation must be viewed as being constitutionally suspect and thus subject to the strict scrutiny standard. See, *Larson v. Valente*, 456 U.S. 228, 247, 252 (1982). Since that legislation was drafted in an excessive and overly broad manner to fulfill a supposed compelling governmental interest to provide special education services, it likewise must be struck down as being in violation of the Establishment Clause of the U.S. Constitution.

In sum, upon application of either or both the *Lemon* test or the *Larson v. Valente* strict scrutiny standard, the Order and Judgment of the New York State Court of Appeals should be affirmed by this Court, and Chapter 748 of the Laws of 1989 must be declared unconstitutional.

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provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

[2] "___ R. ___" refers to the printed three-volume record filed in the New York Court of Appeals. "J.A. ___" refers to the Joint Appendix. "Br.App. ___" refers to the Appendix to this brief; "Pet.App. ___" refers to the Appendix to the Petition for Writ of Certiorari filed by the Petitioner Board of Education of the Kiryas Joel Village School District; "R.Br.App. ___" refers to the Appendix to the Brief Submitted by Respondents in Opposition to the Petition for a Writ of Certiorari.

BACKGROUND AND STATEMENT OF FACTS

Indispensable to an understanding and treatment of the issues before this Court is a full examination into the tenets and practices of the Satmar Hasidic sect, the history of past litigation involving the Satmarer and the context out of which Chapter 748 of the Laws of 1989 became law.

A. The Village of Kiryas Joel, Its Genesis and Inhabitants.

The Village of Kiryas Joel, located in the Town of Monroe, Orange County is one of three communities within New York whose inhabitants are members of the Satmarer, an ultraorthodox Hasidic sect (2R. 406). In 1974 the Satmarer first began to inhabit an area within the Town of Monroe which was known as the Monwood subdivision (3R. 517). When the Monwood subdivision was purchased by the Satmar leadership, it was an approved subdivision, but an unimproved and unbuilt parcel of rural land (J.A. 10).

In 1976 the Satmarer petitioned the Town of Monroe to establish the 320+ acre Satmar-owned Monwood subdivision as an incorporated village (J.A. 10-14). This village was to be known as "Kiryas Joel"[3] (3R. 517-525). The town supervisor described the timing of the incorporation petition as "almost sinister and surely an abuse of the right of self-incorporation" since it was initiated "during the pending of a vigorously litigated issue in which the Town ha[d] accused the Satmar community of serious and flagrant violations of its zoning laws" (J.A. 13-14). Nonetheless, the incorporation petition was granted, as a mandated ministerial act under existing law

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[3] The translation of "Kiryas Joel" is "Community of Joel." The Village's proposed (and eventual) name was in reference to grand Rebbeh Joel Teitelbaum, the founder and first religious leader of the Satmar (2R. 406, 408). Founding Reb Joel Teitelbaum served from 1904-1905 until his death in 1979, at which point he was succeeded by his nephew, Reb Moshe Teitelbaum (3R. 493). Rebbe Moshe Teitelbaum later appointed his eldest son, Reb Aaron Teitelbaum to the rabbi of the Village of Kiryas Joel (3R. 494). The Rebbeh continues to serve as the ultimate decisionmaker on all matters of concern to the Satmar community (3R. 493).

(J.A. 15). The Satmar community vote on the resultant incorporation proposition was, in February 1977, unanimously approved by the Village's residents, save for a single opposing vote (3R. 523).

The Village of Kiryas Joel has grown to become a religious enclave for approximately 8,500 Satmarer. (1R. 32) Neighbors within the Village of Kiryas Joel are "all of the same cultural, social and religious background . . . [and] there are no people living in the Village of Kiryas Joel other than Hasidic Jews" (*Weider* Record p. 70; Br.App. 7).[4] The social and cultural components of the Satmarer Hasidism "are markedly different from the outside community." *Id*; *see also* Br.App. 5-6; 18-19. As the New York Court of Appeals detailed in *Weider*, 72 N.Y.2d at 179-180, 531 N.Y.S.2d at 891:

> Apart from separation from the outside community, separation of the sexes is observed within the village. Yiddish is the principal language of Kiryas Joel; television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive – the boys, for example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmarer children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel. Boys are enrolled in the United Talmudic Academy (UTA) and girls in Bais Rochel, a UTA affiliate. With an apparent over-all goal that children should continue to live by the religious standards of their parents, Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women.

[4] See, page 70 of Record on Appeal in *Board of Education of Monroe-Woodbury Central School District v. Weider*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988) mod'ng 132 App.Div.2d 409, 522 N.Y.S.2d 878 (2nd Dept. 1987) excerpts of which have been included in the Appendix to this Brief (hereinafter "*Weider* Record") (see, Br.App. 1-32).

> (Rubin, Satmar: An Island in the City, at 140 [Quadrangle 1972]) [Footnote omitted].

By founding, and existing within, a community exclusively of Satmarer, and by purposefully being isolated from outside society, the Satmar endeavor to promote and further their own religious beliefs, ideologies and culture. They strive to inculcate in their children the Satmar's ultraorthodox religious values and beliefs, and simultaneously avoid exposing them to acculturation (3R. 494-496). The "sociological way of life for the Satmar Hasidic is one of distained (sic) isolation from the rest of the Community" (J.A. 10). Part and parcel of the Satmar's isolationist attitude toward the evils and adverse influences of contemporary Western society, is its ongoing need to foster, within its community, a negative image of that "outside" world (*Weider* Record, p. 390 (*citing* Israel Rubin, An Island in the City, at 288 (1972)) [hereinafter Rubin]; Br.App. 11)

The insular separatist desires of the Satmar may not be seriously questioned.

> Criticism of Satmar Hasidism is directly related to the insular attitudes of the group. Life in the Satmar ghetto is much as it was in Hungary in the beginning of the century. No compromise is made with the Western world . . . The Satmar Rebbe admonishes his followers to keep every letter of the Torah, fearing that even the small divergence will lead successive generations to still further transgressions and, ultimately, to the demise of Hasidim (3R. 464)

See also, *Parents Assn. of P.S. #16 v. Quinones, et al.*, 803 F.2d 1235, 1237 (2nd Cir. 1986) (hereinafter "*P.S. 16*"). ("In general, the [Satmar] Hasidic faith stresses a strict separation between the Hasidim and the rest of socie[illegible]")

Thus, the entire existence of the Satmar community revolves around the learning and strict adherence to the teaching of both the Torah and the Rebbeh (2R. 407; 2R. 454; 3R. 492-493).[5] "Religion and its preservation in the form interpreted and practiced in Satmar,

[5] For an historical overview of the Satmarer Hasidim, see 2R. 405-406; 2R. 428-469; 3R. 491-497.

occupies a central place in virtually all matters of importance" (3R. 492). Religious indoctrination and adherence to religion is "at the root of the Satmar Hasidim's effort to preserve their culture" (*Weider* Record, p. 298 (*citing* Rubin, *supra* at 45); Br.App. 12). The survival and continued existence of Satmar is viewed as being largely dependent upon the success of its schools. (*Weider* Record p. 345 (*citing* Rubin, *supra* at 139); Br.App. 12).

The students residing in the Kiryas Joel community attend the United Talmudic Academy (hereinafter "UTA") of Kiryas Joel, which includes Bais Rochel, the girl's component. The UTA had an enrollment in excess of 3,000 pupils in 1986 (*Weider* Record p. 112; Br.App. 3).[6] The learning of the Torah and adhering to the teachings of the Rebbe is the central purpose of the private educational system to which the vast majority of Satmar children enroll within the Village of Kiryas Joel. Minimal emphasis is placed upon the value of education as a vehicle for success in the outside capitalistic society away from the Satmar community. As one reknown expert (Israel Rubin; 3R. 491-492) on Satmar Hasidism has noted:

> Secular education beyond a rudimentary knowledge of the "three R's" is limited to occasional technical training, preferably outside the walls of higher learning. Colleges and universities are mysterious unknown territory and are thought to offer, along with some useful technical knowledge, instruction in heresy in an environment free of all moral restraints.

(*Weider* Record, p. 369 (citing Rubin, *supra* at 186); Br.App. 14; *see also* Br.App. 19-20).

The Satmarer's insistence upon the adherence to their ultraorthodox religious beliefs and separatist practices within the public educational setting have, in recent years, been the center of multiple lawsuits, one which eventually and directly led to the passage of Chapter 748.

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[6] Boys and girls are segregated at the UTA and do not mix culturally or socially outside the home. Even within the home, any boy-girl relationship is limited. (*Weider* Record p. 69; Br.App. 6; *see also* Br.App. 18)

B. Past Litigation

1. *Parents Assn. of P.S. 16 v. Quinones et al., supra*, stemmed from an effort to provide, in a manner consistent with the Establishment Clause, remedial education to the Satmar Hasidic Jewish elementary female students attending Beth Rachel Satmar Hasidic School. The New York City Board of Education devised a plan to conduct the remedial classes on the premises of Public School 16. However, in deference to the societal separatist tenets followed by the Satmar and in order to induce the Beth Rachel school administrators to send their students to P.S. 16, the New York City Board of Education established a plan which called for the offering of instruction in classes which were closed off from the rest of the public school building. The Beth Rachel students were simultaneously given assurances that their remedial classes would be conducted separately from any classes offered to the balance of P.S. 16 school's population, which was composed primarily of Hispanic students. *Id.* at 1237.

In striking down the New York City Board of Education's plan, the United States Court of Appeals for the Second Circuit cited the following quotations from the parties' submission with regard to the separatist component of the Satmar, as such was reportedly expressed by some of its followers:

> We struggle very hard to maintain our belief and our culture . . . We want our children separate.
>
> * * *
>
> It's not that these Hispanic people are bad, it's that they're different . . . They are not a good influence on our girls.
>
> * * *
>
> If we have our kids learning with them [the Hispanics], they'll be corrupted . . . We don't hate these people, but we don't like them. We want to be separate. It's intentional. *Id.* at 1238.

Reversing the district court, the court granted plaintiff's motion for a preliminary injunction enjoining implementation

of the plan concluding that the plan had the primary effect of advancing the separatist beliefs of the Satmars in contravention of the Establishment Clause of the First Amendment. *Id.* at 1240-1242. In so doing, the court held that:

> In keeping with their general separatist beliefs, the Hasidim have expressed a desire to keep their children separate. . . . The lengths to which the City has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith. *Id.* at 1241.

2. In *Bollenbach v. Board of Education of the Monroe-Woodbury Central School District*, 659 F.Supp. 1450 (S.D.N.Y. 1987), the plaintiffs (female bus drivers of the Monroe-Woodbury School District) alleged that the Monroe-Woodbury Central School District (a defendant-petitioner in the instant action) violated the Establishment Clause of the First Amendment by accommodating the religious beliefs of the United Talmudic Academy ("UTA") of the Village of Kiryas Joel when it removed female bus drivers from the transportation runs carrying male Hasidic students to the UTA. The District Court held that the Monroe-Woodbury's deployment of only male bus drivers violated the Establishment Clause since that accommodation had the primary effect of advancing the religious beliefs of the Satmars which severely restricted any interaction between the members of the opposite sex.

3. In *Board of Education of the Monroe-Woodbury Central School District v. Weider, etc. et al., supra* ("*Weider*"), defendant-petitioner herein, the Monroe-Woodbury School District, brought suit seeking a judgment declaring that, under *Education Law* § 3602-c(9) (McKinney's 1981), it could not legally provide special education and related services to the handicapped students residing in the Village of Kiryas Joel at any location other than within the Monroe-Woodbury School District's own public school buildings. At all times prior to and during the *Weider* lawsuit, the Monroe-Woodbury School District was (in its own words) "ready and willing to provide special education and related services to the

[defendant children]" (*Weider* Record p. 174; Br.App. 25; see also 3R. 509-510; *Weider*, 72 N.Y.2d at 181, 531 N.Y.S.2d at 892). The venue of those services was, however, a matter in dispute, with the Satmar asserting that those special education services must be provided apart from the regular public school classrooms of the Monroe-Woodbury School District.[7] The defendants in that lawsuit (who were the parents of the involved students) asserted that the special education needs of their children should be provided by the Monroe-Woodbury School District on the premises of the Satmar Hasidic school which their children attended for their regular instruction i.e., either the UTA or Bais Rochel. The parents maintained that the delivery of these special education services at the site of the student's private school was essential because of *inter alia*, "[T]he panic, fear and trauma [the students] suffered in leaving their own communities and being with people whose ways were so different from theirs." 72 N.Y.2d at 181, 531 N.Y.S.2d at 892.[8] It was also argued by the defendant-parents that for the Monroe-Woodbury School District not to provide the special services at their religious schools, or at a neutral site, violated and interfered with their religious beliefs. *Id.* at 188, 531 N.Y.S.2d at 897.

The New York Court of Appeals held in *Weider* that *Education Law* § 3602-c(9) (McKinney 1981) did not require the Monroe-Woodbury School District to provide special education services to defendants' children within the Monroe-Woodbury School District's regular classes and programs.

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[7] From 1983-1986, various forms of special education services were provided by the Monroe-Woodbury School District to a broad range of Satmar Hasidic pupils who were enrolled in and who were educated in the Monroe-Woodbury's public schools. Noticeable improvement and progress was observed in the advancement of those pupils while enrolled in the public schools (*Weider* Record, pp. 174-178; Br.App. 25-28).

[8] The genesis for the alleged existence of any so-called psychological reactions was later described by the Court of Appeals Judge Stewart Hancock, Jr. in his concurring opinion in the court below as not being prompted "by anything other than the well-meaning desire to comply with the religious requirement of keeping the Satmarer children separate from other children, concededly the cause of whatever emotional or psychological effect the children may have suffered" (Pet.App. 33a-34a).

However, the Court further held that, although the Monroe-Woodbury School District was not under a statutory restriction which limited its rendition of special education services to its own school buildings, it did not follow that the children were entitled to receive instruction within their own religious schools or even at a neutral site within the Village of Kiryas Joel. In this respect, the Court of Appeals stressed that, "defendants' statutory entitlement to special services does not carry with it a constitutional right to dictate where they must be offered." *Id.* at 188, 531 N.Y.S.2d at 889.

Instead of making reapplication with the Monroe-Woodbury School District to receive the special education services in the manner prescribed by the court in *Weider*,[9] the Satmar directed their efforts toward a political/legislative resolution of the controversy. Thus, in the wake of the Court of Appeals' July 1988 *Weider* decision, and as a result of the Satmar's political efforts, Chapter 748 of the Laws of 1989 was enacted into law.

C. Chapter 748 of the Laws of 1989

Assembly Bill number 8747 was signed into law by the Governor of New York on July 24, 1989, becoming Chapter 748 of the Laws of 1989 (1R. 90; fn. #1, *supra*). While the bill was before the Governor awaiting his approval or disapproval, the New York State Education Department, along with a number of organizations and entities, urged the Governor to veto the bill for, *inter alia*, the reasons that it violates the required constitutional separation of church and state and the equal protection provisions of the *Constitution* (1R. 99-109).

However, in urging approval of the legislation, New York Assembly sponsor Joseph Lentol, in his July 7, 1989 memorandum to the Governor, explained the purpose of the bill to be as follows:

> I write regarding Assembly Bill 8747 which establishes a new union free school district in Orange County. This legislation ends years of legal battles between the Monroe-Woodbury School District and the residents of the village of Kiryas Joel over how to provide state funded special education programs to the Hasidic children of the county.
>
> The hasidic jewish community hold firmly to its religious tenets. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end. (J.A. 19)

[9] See fn. #16, *infra* at page 29.

See also, Assembly member Silver's memorandum in support to the Governor (J.A. 38-39).

Rejecting the constitutional arguments advanced by those opposing the legislation, the Governor signed Assembly Bill 8747 into law (J.A. 40-41).

Chapter 748, thus, established, commencing July 1, 1990, a new and separate union free school district, to be known as the Kiryas Joel Village School District, which was carved out from the existing Monroe-Woodbury Central School District, and which was to be coterminous with the geographical boundaries of the Village of Kiryas Joel (1R. 90-91). Preparatory to the formal opening of that school district on July 1, 1990, certain essential organizational steps were undertaken, including the nominating and electing of the first Board of Education for the Kiryas Joel Village School District. The immense control and power possessed and exercised by the supreme religious leader of the Village of Kiryas Joel became immediately apparent throughout this process.

In the spring of 1990, during the nomination and election process for the inaugural school board, a controversy promptly erupted within the Kiryas Joel community because of the decision made by one of its residents (Joseph Wallman) to run for a seat on the seven member Kiryas Joel board of education. Seven candidates had already received the public endorsement of the Satmar Rebbe Moshe Teitelbaum. Because of his decision to run unendorsed, candidate Wallman was not only publicly denounced by the Grand Rebbe, but he became the recipient of considerable harassment within the Satmar community, and was formally expelled from the Congregation

Yetev Lev D'Satmar. This punishment led to the expulsion of his children from that congregation's yeshivas. See, *Wallman v. United Talmudical Academy, etc.*, 147 Misc.2d 529, 558 N.Y.S.2d 781 (Sup.Ct. Orange County 1990) ("*Wallman*")[10] which culminated in a decision holding Rov Aaron Teitelbaum, the town's rabbi and the son of the current Grand Rebbe, in contempt of court. *Wallman* at 533, 558 N.Y.S.2d at 783-784.

All seven of the candidates receiving the endorsement of the Grand Rebbe were elected to seats on the first board of education of the Kiryas Joel Village School District. (4R. 487-488).[11]

From the opening of Kiryas Joel Village School District in July of 1990 to the time the underlying summary judgment motions were filed, the district enrolled thirteen handicapped resident pupils from the Village of Kiryas Joel, and contracted with two nearby school districts (the East Ramapo and Monroe-Woodbury school districts) to receive an additional 20 of their Satmar children with handicapping conditions (3R. 512; 715 3R. 504). Based upon census data compiled and maintained by the New York State Education Department, the student enrollment figures for each of those school years were as follows: 1991-92 – 10.9 full time resident students (Resp.App. 9), 29 non-resident students (Resp.App. 9) with 10 students enrolled part-time; 1992-93 – 13 full time resident students (Resp.App. 3, 9), 29 non-resident students (Resp.App. 9) and an average of 95.14 parochial students who receive supplementary special education services under the dual enrollment provisions of New York State Education Law § 3602-c (McKinney 1983) (*Id.* at 9-10). The vast majority of these dual enrolled students (i.e. 83.638) received one (1)

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[10] Excerpts of the record of that proceeding may be found in the Record at 1R. 82-86; 3R. 590-631; 2R. 470-480; 483-490.

[11] Among those nominated and elected to the Kiryas Joel Village School board was Abraham Weider (Resp.App. 7) who was a defendant in *Board of Education v. Weider, supra;* the president of the community's major congregation (the Yetev Lev D'Satmar) and a representative of the Grand Rebbe (1R. 480; 487-490).

period of special education service per day (Resp.App. 9). For its first year of operations (1990-91), the Kiryas Joel Village School District was allocated $98,350 in state funds (3R. 762). The state aid receipts for the succeeding school years were as follows: 1991-92 $433,383 (projected) (3R. 762); 1992-93 $496,741 (Br.App. 33-35).

D. Decision of the Courts Below

In affirming the order and judgment of the Supreme Court, Appellate Division (187 A.D.2d 16, 592 N.Y.S.2d 123; Pet.App. 61a-91a), the New York State Court of Appeals concluded that Chapter 748 was facially unconstitutional as being in contravention of the Establishment Clause of the First Amendment of the Federal *Constitution* (Pet.App. 16a-17a) (81 N.Y.2d 518, 601 N.Y.S.2d 61).

The court based that determination on the conclusion that the "second prong of *Lemon [v. Kurtzman*, 403 U.S. 602] had been clearly violated" since the principal or primary effect of chapter 748 was to advance religious belief[12] (Pet.App. 10a). The court concluded that:

> [T]h[e] symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District under chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices. (Pet.App. 12a)

For the reasons expressed by the court below, and for all of the additional reasons which are to be set forth in the remainder of this brief we urge the Court to affirm the lower court's determination.

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[12] The court's majority chose not to address whether the first ("purpose") or the third ("excessive entanglement") components of *Lemon* were also violated (Pet.App. 16a). Judge Hancock, Jr. held, in a separate concurring opinion, that both the "primary effects" and "purpose" elements of *Lemon* were violated (Pet.App. 30a).

ARGUMENT

I. CHAPTER 748 OF THE LAWS OF 1989 VIOLATES THE CONSTITUTUTIONAL PROSCRIPTION AGAINST THE ESTABLISHMENT OF RELIGION.

The analytical framework for determining whether Chapter 748 of the Laws of 1989 comports with the Establishment Clause of the First Amendment is the three-part test pronounced in *Lemon, supra*.[13] Since 1971 *Lemon* has been the guiding standard in determining the presence or absence of an Establishment Clause violation. See, e.g. *Lamb's Chapel v. Center Moriches Sch. Dist.*, ___ U.S. ___, 124 L.Ed.2d 352, 363 (1993); see also *Lee v. Weisman*, ___ U.S. ___, 120 L.Ed.2d 467, 490-491 n.4 (1992) (Blackmun, J., concurring) ("Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision in *Marsh v. Chambers*, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S. Ct. 3330 (1983), has the Court not rested its decision on the basic principles described in *Lemon*"). The well-settled criteria of *Lemon* ought to be applied by the Court to this appeal, as was done by all three of the lower courts (Pet.App. 1a-60a; 61a-91a; 92a-101a). In addition to the requirements of *Lemon*, the most fundamental and basic precept central to the meaning of the Establishment Clause must be reemphasized.

It has often been held that the establishment proscription of the First Amendment forbids not only the formulation of a state religion, but requires that government, at all times, remain *neutral* with respect to all religion. In *Lee v. Weisman*, *supra*, ___, 120 L.Ed.2d at 482-483, this Court noted that "[t]he central meaning of the Religion Clause of the First Amendment . . . is that all creeds must be tolerated and none

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[13] To pass constitutional muster under the Establishment Clause:
First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, * * * ; finally, the statute must not foster 'an excessive government entanglement with religion' [citation omitted], *Lemon, supra* at 612-613.

favored." "[S]ubtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses" are all forbidden under the Establishment Clause. *Gillette v. U.S.*, 401 U.S. 437, 452 (1971). In *School Dist. of Abington Township, Pennsylvania, et al. v. Schempp*, 374 U.S. 203, 222, (1963) the Court held:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

A careful examination of the record of this appeal, and, in particular, the facts and circumstances preceding and surrounding the enactment of Chapter 748 will, it is submitted, compel the conclusion that Chapter 748, not only fails to pass the three-part *Lemon* test, but violates the more fundamental Establishment Clause requirement of governmental religious neutrality.

A. The Legislative Purpose of Chapter 748 Was To Further The Mission Of The Satmar Hasidic Sect By Creating An Independent School System For The Religious Enclave Of The Village Of Kiryas Joel

The purpose prong of the *Lemon* test:

> [I]s not satisfied . . . by the mere existence of some secular purpose, however, denominated by religious purposes [cite omit.]. If a principal purpose is to further statute is void.
>
> That any secular purpose is insufficient under *Lemon* is clear from the fact that every statute can be described in such a way that it includes a secular purpose.

Cammack v. Waihee, 944 F.2d 466, 469 (9th Cir. 1991) (Reinhardt, J. dissenting on denial of rehearing *en banc*); see also, *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J.,

dissenting) ("The purpose prong means little if it only requires the Legislature to express any secular purpose and omit all sectarian references, because legislators might do just that").

Thus, in considering the first element of the *Lemon* test in the present case (i.e. that the legislation must have a secular purpose), the Court must look beyond any claim that the purpose of Chapter 748 was merely to provide the necessary authorization to educate students in need of special education services residing within the Village of Kiryas Joel. Any assertion to that effect totally fails to satisfy the purpose prong of *Lemon* for indeed **those special services were, at all times, made available to the students through the Monroe-Woodbury School District.** See Pet.App. 15a, 63a-64a and 69a; see, also, discussion of *Weider* at pp. 8-10, *supra*. However, it is clear from the record that the manner and form of the delivery of those special services by the Monroe-Woodbury School District were incompatible with the religious tenets and ideologies governing the Satmars. Because of this lack of compatibility with their ultraorthodox religious beliefs, and the unwillingness of the Monroe-Woodbury School District to accede to the demands of the Satmars, Chapter 748 was, in fact, proposed and eventually enacted into law. That Chapter 748's true purpose was to succumb to the religious tenets and wishes of the Satmar community of Kiryas Joel is clear from the history of its enactment. The purpose, as expressed by the Assembly sponsor of Chapter 748 in his legislative memorandum to Governor Cuomo while that bill was awaiting approval was clear. See, *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (upon determining legislative purpose of law by reference to purpose expressed by statute's legislative sponsor, statute was struck down, as facially invalid, as being an advancement of religion in violation of the Establishment Clause); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 124 L.Ed.2d 472, 495 (1993) (nullifying city ordinance upon considering objective events and factors leading to ordinance's enactment, including its legislative history, and contemporaneous statements made by decisionmakers); *Wallace v. Jaffree*, 472 U.S.

38, 108 (1985) (Rehnquist, J., dissenting) ("[T]he constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out").

The Assembly sponsor of Bill 8747, Assemblyman Joseph R. Lentol, stated to the Governor, in his July 7, 1989 memorandum urging executive approval, that the purpose of the bill:

> [E]nds years of legal battles between the Monroe-Woodbury School District and the residents of the Village of Kiryas Joel over how to provide state funded special education programs to the Hasidic children of the county.
>
> **The hasidic jewish community holds firmly to its religious tenentes. With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end.** [Emphasis added] (J.A. 19)

Assemblyman Sheldon Silver similarly stated in his July 24, 1989 letter to the Governor, that:

> The bill represents a legislative response to [the Court of Appeals' *Weider* decision] by providing a mechanism through which students **will not have to sacrifice their religion traditions** in order to receive the services which are available to handicapped students throughout the State. [Emphasis supplied] (J.A. 38-39)

The New York State Division of the Budget likewise advised the Governor, in its memorandum recommending disapproval of the bill that the:

> [T]he Hasidic residents of Kiryas Joel have expressed a number of significant concerns to the Monroe-Woodbury School District regarding the transportation and education of their handicapped pupil population. These concerns are primarily attributable to the religious precepts of the Hasidic sect prohibiting the intermingling of male and female children in such setting.

* * *

> The bill provides a vehicle for resolution of the current conflict between the Monroe-Woodbury school district and the residents of Kiryas Joel through the establishment of the subject school district, with its own tax base and State-aid entitlements. (J.A. 32)

In signing Assembly Bill 8747 in law, the Governor acknowledged that the "bill is a practical solution to . . . an intractable problem" and is an "effort to resolve a long-standing conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (J.A. 40-41). The Governor noted that there are approximately 100 handicapped students who are "not receiving special education services they need" since the Court of Appeals held in *Weider* that the Monroe-Woodbury School district "could not be compelled to provide special education services at a neutral site." *Id.* Concluding, the Governor noted that, "[T]his bill is a good faith effort to solve this unique problem." *Id.*

It is readily apparent from the overall legislative history of Chapter 748, that it was enacted to accommodate the religious objections made by the Satmarer to having their children taught in, and exposed to, a school environment apart from their own. It was **only** due to the existence of, and Satmar's strict adherence to the separatist ideology and religious doctrine, that these objections existed. The Supreme Court, Appellate Division, as well as the trial court so concluded. (Pet.App. 66a-67a; 99a-100a).

Chapter 748 had no "clear secular purpose", which was "sincere and not a sham". *Edward v. Aguillard*, 482 U.S. at 585, 586-587. Due to the absence of a true secular purpose, Chapter 748 violates the Establishment Clause. *Lemon, supra.*

Moreover, to enact legislation in direct response to these religious based objections, and thereby create a school system which is totally isolated from the secular world, constitutes the **ultimate** governmental act of promoting the Satmar religion in direct contravention of the second ("primary effects") prong of the *Lemon* test.

B. Chapter 748 Has The Primary Effect Of Advancing The Religious Doctrine Of The Satmar Hasidim.

Finding that Chapter 748 failed to meet the "effects" test of the *Lemon* decision, the New York Court of Appeals held that:

> We conclude that this symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District under chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices. Thus, the principal or primary effect of chapter 748 of the Laws of 1989 is to advance religious beliefs (Pet.App. 12a).

This finding of the court below is firmly based in the record.

Under the "effects" test of *Lemon*, the primary focus is whether the governmental action at issue communicates a message of governmental endorsement or disapproval of religion. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Under the Establishment Clause, government is not only forbidden from creating a state religion, but is obligated to remain **neutral** with respect to all religion. *P.S. #16, supra* at 1240 (citing *School Dist. of Abington Township, Pennsylvania, et al. v. Schempp*, 374 U.S. 203, 215-216 (1963)):

> The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs. . . .

See also, *Lee v. Weissman*, ___ U.S. at ___, 120 L.Ed.2d at 488 (Blackmun, J., concurring).

Even a symbolic union of government and religion in an apparent sectarian enterprise is an impermissible effect under the Establishment Clause. *Grand Rapids School District v.*

Ball, 473 U.S. 373, 391 (1985) (declaring unconstitutional state programs financing the offering of public education classes by public school teachers which were held on non-public school premises leased to public schools); see also, *County of Allegheny v. ACLU*, 492 U.S. 573, 593-594 (1989) ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on question of religious belief . . . ").

Given the history of both the difficulties and litigation between the Satmars and the public education community, all of which directly emanated from the religious precepts of the Satmarer, the act of government in granting to the Satmars their own public school system geographically coextensive with their religious community clearly and undeniably gives the message to the general public, as well as to the Satmar community, that government is supportive of, and endorses Satmar religious tenets. This result runs directly afoul of settled precedent barring any form of governmental endorsement of any religions. As the Court of Appeals for the Second Circuit in *P.S. 16*, 803 F.2d at 1241, observed in declaring unconstitutional the plan which segregated the Hasidic student population from the rest of the student body:

> [T]he City's Plan seems plainly to create a symbolic link between the state and the Hasidic sect . . . The lengths to which the City has gone to cater to [the general separatist] religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist religious tenentes of the Hasidic faith.

There can be no doubt that the creation by the State of New York of an entirely new public school district exclusively for the Hasidim, for the identical reason, can not avoid being perceived any differently.

As was succinctly expressed by the New York Court of Appeals:

> Because special services are already available to the handicapped children of Kiryas Joel, the primary effect of chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus a 'core purpose of the Establishment Clause is violated' (see, *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389, *supra*) (Pet.App. 15a)

In sum, Chapter 748 fails to meet the second element of the *Lemon* test since its primary effect is to advance religion.

C. Assuming Arguendo That Chapter 748 Was Susceptible To Effective Monitoring, That Monitoring Would Necessarily Entail Excessive Entanglement Between Government And Religion.

The third and final test which must be met under *Lemon* is that "the statute must not foster 'an excessive government entanglement with religion' [cite omit]". *Lemon*, *supra* at 613. Chapter 748 of the Laws of 1989 fails to fulfill this criteria.[14]

In *Lemon*, this Court was faced with a challenge directed at two state statutes which authorized the use of public funds to subsidize the salaries of teachers teaching secular subjects in non-public school. Since the majority of the recipient teachers taught in parochial schools, and since, under the enabling statute, each teacher had to fulfill set conditions which were promulgated to avoid any form of religious instruction or inculcation, the Court, in striking down the legislation, held that the statute fostered an excessive entanglement. The Court stated that:

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[14] The New York Court of Appeals chose not to address the "excessive governmental entanglement" issue, since it found the statute to have violated the second component of *Lemon* (Pet.App. 16a).

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . [the statute's] restrictions are obeyed and the First Amendment otherwise respected. **Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.** These prophylactic contacts will involve excessive and enduring entanglement between state and church. *Supra* at 620 [Emphasis added].

As this Court similarly held in invalidating the second statute involved in *Lemon* at 620-621:

> [T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.

The same degree of impermissible church-state entanglement exists in the instant case.[15]

During the legislative process, the Division of the Budget advised the Governor that, if the then pending bill was enacted into law, it would present serious entanglement problems. The Division of the Budget warned as follows:

> Although the Kiryas Joel School Board will be legally bound to operate its programs in accordance with Education Law and Commissioner's Regulations, this unique arrangement will no doubt present the State Education Department with **an extraordinary complex task to monitor/ audit the operations of this school district to ensure compliance with law. The special circumstances under which**

[15] Given the peculiar circumstances preceding and surrounding the passage of the legislation at issue (not to mention the controversy which erupted when Joseph Wallman, a Rebbe-unendorsed school board candidate, chose to run for a seat on the first school board elections following passage of Chapter 748), it is highly doubtful that *any* form of effective monitoring of the Kiryas Joel Village School District (perhaps short of daily full-time placement of monitoring officials within the classrooms) exists which would be adequate to assure that religion and religious influences remain out of the school building.

> **this school district has been created may also invite constitutional challenges regarding the possibility of excessive government entanglement with religion.** (J.A. 35) [Emphasis added]

Being obviously aware of the potential constitutional problems which might emanate from his signing of the bill into law, the Governor himself issued the following admonition:

> Of course this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. (J.A. 41)

Contrary to the strong advice and words of caution extended by the Governor, the religious hierarchy within the Village of Kiryas Joel has, in fact, directly intermeddled in the affairs of the school district by first selecting and publicly endorsing the nomination of seven members of the initial school board and then, most significantly, by taking acts of retribution against an eighth candidate (Joseph Wallman). See, 2R. 483-490; 3R. 590-641; *Wallman v. United Talmudical Academy*, 147 M.2d 529, 558 N.Y.S.2d 781 (1990).

In addition, the serious monitoring difficulties which were foreseen by the Division of the Budget have since become a reality. The Education Department officials who are responsible for monitoring Kiryas Joel's public school operations have "confirmed that [it] is an insular, segregated educational setting in which both the religion and culture of the Satmarer are inextricably bound" (3R. 511). It has also been reported that during a site visit to the school, Education Department officials observed displayed in the classroom, photographs of students lighting, in the company of their public school teacher, the candles of a menorah. *Id.*

It would be unrealistic to believe that a school system: (a) which came into existence (along with the Village itself) in direct response to the strong religious ultraorthodox beliefs of the Satmarer; (b) which is wholly situated in an insular religious community occupied exclusively by the Satmar Hasidim, who expect their religious beliefs and life-style to

be respected by all who come in contact with their community (3R. 514-517); (c) which exists in a community whose civic leaders are closely allied with and subordinates of the Grande Rebbe, or his son, the Rov; and (d) whose first school board is comprised of Satmar, all of whom were selected by the Grand Rebbe, would not be substantially affected, directly or indirectly, subtly or otherwise, by the ultraorthodox precepts and ideologies of the Satmarer. Indeed the type of retribution, punishment and harassment which school board candidate Joseph Wallman received, **even while the instant litigation was pending,** clearly demonstrates the pervasiveness of, and priority accorded to the adherence to religious doctrine within the Kiryas Joel community. The Kiryas Joel school system can not avoid being directly affected by those same forces (has already occurred), notwithstanding any alleged "good faith" efforts which may be undertaken by the school administration or the school teachers employed by the Board of Education of the Kiryas Joel Village School District.

As was stated in *Grand Rapids Sch. Dist. v. Ball, supra* at 387-388:

> The danger arises 'not because the public employee [is] likely deliberately to subvert his task to the service of religion, **but rather because the pressures of the environment might alter his behavior from its normal course.'** *Wolman v. Walter*, 433 U.S. 229, 247, 53 L.Ed.2d 714, 97 S. Ct. 2593, 5 Ohio Ops. 3rd 197 (1977). . . . [The public school] teachers [serving] in such a [non-secular] atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach . . . (Emphasis supplied).

The religious environment which is the center of the Kiryas Joel community would likewise make it hard for the most dedicated educator "[w]ith the best of intentions, . . . to make a total separation between secular teaching and religious doctrine . . . ". *Lemon* at 618-619; cf. *Meek v. Pittenger*, 421 U.S. 349, 369-370 (1975). At minimum, the "potential for impermissible fostering of religion is present". *Lemon, supra* at 619.

As new employees of the Kiryas Joel Village School District, all of its professional staff personnel occupy probationary positions and, thus, have tenuous holds on their employment. See, *Education Law* § 3012 sub. 1(a) (McKinney 1981) (Supp. 1993) (fixing, in most instances, a probationary period for all newly hired teachers of three years in duration). Given this reality, and given further the fact that under the *Education Law* the ultimate authority resides within the Board of Education (which is exclusively comprised of Satmars chosen by the Rebbe), when it comes to terminating the services of any probationary employee or granting them tenure, (*Education Law* § 3012 subd. 1(a), 2) (McKinney 1981) (Supp. 1993) the wishes, be they expressed or implied, proper or improper, of those school authorities will no doubt be respected. As was aptly expressed by the New York Court of Appeals, albeit in a different context, in *Baer v. Nyquist*, 34 N.Y.2d 291, 299, 357 N.Y.S.2d 442, 448 (1974):

> It is not wise . . . in dealing with a personnel system to have too much confidence in the "choices" made by a school teacher **who must seek and receive accommodation from his superiors.** (Emphasis supplied).

It was unquestionably due to all events, including the series of lawsuits, leading up to the proposed legislation that the Division of the budget forewarned the Governor of the "extraordinary complex task" facing the State Education Department to closely monitor the Kiryas Joel Village School District to assure its compliance with the law (J.A. 35). The controversy surrounding the first school board election and observations personally made by Education Department officials of the occurrence of obvious constitutionally impermissible religious activity within the classroom solidifies the prediction voiced by the Division of the Budget and plainly demonstrates the absolute need for continuous and comprehensive monitoring of the Kiryas Joel's public school district's daily operations to insure that a strict non-ideological environment exists. However, as the Court concluded in *Meek*

v. Pittenger, 421 U.S. 349, 370 (1975) (declaring unconstitutional a program pursuant to which public school teachers provided auxiliary secular services to parochial students):

> [P]rophylactic contacts devised [under the challenged statute] to insure that the teacher played a strictly non-ideological role **would necessarily give rise to an intolerable degree of entanglement between church and state.** (Emphasis supplied).

See also, *Grand Rapids School District v. Ball*, *supra* at 386.

The same, if not a greater degree of governmental entanglement would, of necessity, result here in order to effectively determine and assure that the pervasive religious influences which exist within, and are inextricably connected with, the Kiryas Joel community do not creep into the public school classrooms. As a consequence, Chapter 748 fails to meet the third element of the *Lemon* test since it results in excessive entanglement between government and religion.

D. Petitioner Board of Education's Argument that Chapter 748 is a Valid Accommodation of the Satmar Religion is Fatally Flawed.

In its brief, petitioner Board of Education argues that Chapter 748 merely remedied the pre-existing state-imposed "deterrent" to the free exercise of religion which has resulted in the residents of the Village of Kiryas Joel forbearance of special education services; that Chapter 748 was necessary and is constitutionally appropriate to accommodate "the needs of a community of devoutly religious people" and to "ameliorate a burden that result[ed] from the free exercise of religion" (Petitioner Board of Education's Brief, p. 40-43.

It is of note that the same accommodation argument which petitioner advances was asserted in *P.S. #16*, *supra* and soundly rejected by the Court of Appeals for the Second Circuit. In dismissing that claim, the Court of Appeals held that:

> The Free Exercise Clause of the First Amendment ('Congress shall make no law . . . prohibiting the free exercise [of religion]') does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief of if it can show a compelling reason for doing so. *See Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 1256, 90 L.Ed.2d 735 (1986). Avoiding a violation of the Establishment Clause that would otherwise result from an apparent endorsement of the tenets of a particular faith is ample reason for compelling that choice. *Supra* at 1241-1242.

In addressing petitioner's "accommodation" claim, *amici* concede that under the protection of the Free Exercise Clause, the Satmar should be allowed to fully follow the precepts and practices of their religion within their synagogues, within their homes and their religious schools. However, the Free Exercise Clause does not permit the Satmar to insist, through reliance upon that Clause, that its religious practices and principles take precedence over the mandate of the Establishment Clause of barring direct or indirect governmental sponsorship of religion, or any religious or cultural-based religious tenet or practice. Case law accords clear priority to the Establishment Clause.

As this Court stated in *Lee v. Weisman*, *supra*, 120 L.Ed.2d at 480:

> The principle that government may accommodate the free exercise of religion **does not supercede the fundamental limitation imposed by the Establishment Clause.** It is beyond dispute that, at a minimum, the Constitution guarantees that government may not **coerce anyone to support** or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or **tends to do so.** [Emphasis added]

The net effect of Chapter 748 has been to sanction *inter alia* the religious separatist dogma of the Satmarer. The petitioner School District claim of accommodation runs afoul of the Free Exercise Clause of the First Amendment. "[T]he right to conscience is not only implicated when government engages in direct or indirect coercion [but is] also implicated when the government requires individuals to support the practices of a faith with which they do not agree." *Marsh v. Chambers*, 463 U.S. at 803 (Brennan, J., dissenting). The dangerous precedent which Chapter 748 establishes is best described by Justice Kennedy when he stated in *Lee v. Weisman*, *supra* at ___, 120 L.Ed.2d at 483-484 that:

> The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition of forms of state intervention in religious affairs with no precise counterpart in the speech provisions, *Buckley v. Valeo*, 424 U.S. 1, 92-93, and n.127 (1976) (per curiam). The explanation lies in the lesson of history that in the hands of government what might begin as a tolerant expression of religious vows may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The passage of Chapter 748 can not be viewed as a mere accommodation of the "burden that result[ed] from the free exercise of religion." Rather, that legislation represents, in no uncertain terms, a wholesale acceptance and adoption of the underlying religious principles of the Satmar through the governmental formulation and granting to the insular Satmar community their own public school system and all the financial and non-financial benefits and awards which that has to offer. The delivery and receipt of needed services for the handicapped children of Kiryas Joel, upon the terms laid down by the Satmar, may neither operate as the mechanism to undermine, nor be subservient to, the clear mandate of the Establishment Clause barring any form of governmental sponsorship or support of religion.

II. BESIDES ORDERING AFFIRMANCE BASED UPON *LEMON*, APPLICATION OF THE STRICT SCRUTINY MANDATE OF *LARSON V. VALENTE*, IS A FURTHER BASIS FOR AFFIRMING THE LOWER COURT'S DETERMINATION THAT CHAPTER 748 IS UNCONSTITUTIONAL

Although concluding that *Lemon* was also transgressed, Chief Judge Judith Kaye of the court below observed, in her concurring opinion, that the preferred analytical framework for examining the constitutionality of Chapter 748 is the strict scrutiny test, as was formulated and applied in *Larson v. Valente*, 456 U.S. 228 (1982) (Pet.App. 18a-29a). Finding that Chapter 748 embodied a denominational preference or benefit in favor of the Satmar Hasidim of

Kiryas Joel (*id.* at 24a), Chief Judge Kaye concluded that, even assuming arguendo that the providing of special education services to Satmar children was a "compelling secular interest," the legislation was invalid since it "plainly went further than necessary to resolve the problem" (*Id.* at 25a). Rather than being narrowly tailored to fulfill the assumed compelling secular interest of providing special education services, the state legislature "remarkabl[y] act[ed]" to carve from an existing school district a new district, coterminous with a religious enclave, and vested that new district with "all of the powers of a union free school district" (*Id.* at 25a-26a). Since that legislative response vastly exceeded the supposed governmental interest which the statute was intended to address, and given the presence of more moderate, available measures (Pet.App. 27a-29a),[16] Chief Judge Kay viewed Chapter 748 in violation of the Establishment Clause.

It may not be seriously challenged that Chapter 748 exclusively accords the Satmar Hasidim of the Village of Kiryas Joel a clear benefit because of their religious ideologies and practices. Cf. *Marsh v. Chambers*, 463 U.S. at 801, n. #11 (Brennan, J., dissenting). Taking exception to Chief Judge Kaye's assumption as to the presence of a governmental interest, *amici*, first, maintain that although the providing of necessary educational services to children is undoubtedly an essential governmental function, those services were at all times available from the Monroe-Woodbury School District. Essentially, Chapter 748 is duplicative legislation designed to acquiesce in the wishes of the Satmar. Since there was, in the first instance, no real and legitimate legislative void which necessitated the passage of Chapter 748, there was no underlying compelling governmental interest. Chapter 748 thus fails the strict scrutiny inquiry and must be deemed invalid.

Moreover, assuming *arguendo* the legitimate presence of an unfulfilled "compelling governmental interest," the adoption of

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[16] Chief Judge Kaye posits various viable narrowly tailored legislative alternatives which would not have been subject to the same claim of overbreadth (*Id.* at 539). She, moreover, notes the irony in the concession by the Monroe-Woodbury School District (that the "provision of secular instructional services to students of the same faith at a neutral site is constitutionally permissible," Pet.App. 29a) may indeed obviate the need for *any* corrective legislation.

Chapter 748, with the resultant creation of an entirely new school system, was clearly a legislative act which exceeded, by far, the purported governmental need sought to be fulfilled. The legislation did not, in any way, preclude the Kiryas Joel School Board from operating a full-scale public school system for all disabled, as well as non-disabled, pupils of the Kiryas Joel community. Indeed, the record shows that the Kiryas Joel School authorities were fully aware of their entitlement in this regard by having made plans to purchase a school building (with subsidized state aide revenues) for the purpose of providing kindergarten instruction for non-handicapped students (R.Brief App. pp. 24-25). "The absences of narrow tailoring suffices to establish the invalidity of the [statute]." *Church of Lukumi v. Hialeah*, ___ U.S. at ___, 124 L.Ed.2d at 499. *Wilson v. NLRB*, 920 F.2d 1282, 1287 (6th Cir. 1990).

CONCLUSION

For all of the foregoing reasons, the order and judgment of the New York Court of Appeals should be affirmed.

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Court of Appeals
STATE OF NEW YORK

Board of Education of the Monroe-Woodbury Central School District,

Plaintiff-Respondent,

– against –

ABRAHAM WIEDER, Individually and as the Parent and Natural Guardian of HUDES WIEDER, a Handicapped Child Under the Age of Fourteen Years; ISACK SILBERSTEIN, Individually and as the Parent and Natural Guardian of SHEINDLEE SILBERSTEIN, a Handicapped Child Under the Age of Fourteen Years; JOSEPH HIRSCH, Individually and as the parent and Natural Guardian of CHANA HIRSCH, a Handicapped Child Under the Age of Fourteen Years; ITAMAR KAUFMAN, Individually and as the Parent and Natural Guardian of RIVKA KAUFMAN, a Handicapped Child Under the Age of Fourteen Years; MOSES STERN, Individually and as the Parent and Natural Guardian of BENJAMIN STERN, A Handicapped Child Under the Age of Fourteen Years; each of the above is also named and served in this capacity as a class representative on behalf of others similarly situated,

Defendants-Appellants.

RECORD ON APPEAL

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(Orange County Clerk's Index No. 7738/1985)

Affirmation of Menachem Friedman
Dated August 20, 1986 –
In Support of Motion (pp. 66-76)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, Plaintiff, ABRAHAM WIEDER, ISACK SILBERSTEIN, JOSEF HIRSCH, ITAMAR KAUFMAN and MOSES STERN, individually and as class representatives on behalf of others similarly situated, Defendants.	Index No. 7738/85 Assigned Justice: Irving A. Green AFFIRMATION

MENACHEM FRIEDMAN affirms as follows:

1. I am Director of Special Education at the United Talmudic Academy of Kiryas Joel (Hereinafter "UTA"), which includes Bais Rochel, a girls' school, in the Village of Kiryas Joel in Orange County, New York. UTA has a total enrollment in excess of 3000.

2. The Village of Kiryas Joel is within the jurisdiction of the Board of Education of the Monroe-Woodbury Central School District (hereinafter the "Board").

3. I make this Affirmation, rather than an Affidavit, because I am prevented by my religious beliefs from swearing an oath. All of the statements contained herein are true.

4. In or about 1984 I was the person designated by UTA to deal with the Board concerning issues of special education and related services for handicapped children who were attending UTA. At that time the Board was providing services to some of the handicapped children attending UTA. These services were provided in a special wing of the UTA building which was maintained separate and apart from the regular premises of UTA and which was approved by Dr. Alexander, the Superintendent of the Board, as a neutral site.

5. The neutral site is not used for any religious purposes whatsoever and it is only utilized by handicapped children.

6. The type of services that were provided by the Board for handicapped children at the neutral site included the following: occupational therapy, physical

therapy, speech therapy, assistance to the hearing impaired and adaptive physical education.

7. The handicapped children of UTA included children who were mentally retarded, hard of hearing, deaf, speech or language impaired, seriously emotionally disturbed, orthopedically impaired as well as children with special learning disabilities who required special education and related services. Some of these children were classified as having multiple handicaps. Included among the physical handicaps were spina bifida, cerebral palsy, Down's syndrome and others. Some of the children have I.Q.'s as low as 40. Because of their handicaps, some of the children were unable to walk and some were unable to talk at all. All these children were in desperate need of assistance.

8. In addition to the physical and mental handicaps suffered by these children there is a further factor which affected the ability of these children to obtain special education and related services to the handicapped. These factors relate to the language, social and cultural backgrounds of the handicapped children enrolled in UTA. All of these children are the children of Hassidic Jewish families, whose principal language in the household is Yiddish. Yiddish is also the principal language in the entire village of Kiryas Joel. It is the practice of the Hassidic community not to use the television, radio, newspapers, magazines or other English language publications in their homes or in the Village. Thus, the handicapped children enrolled in UTA are not accustomed to the use of English in written or spoken form and many are completely unable to communicate in English, at all.

9. Socially and culturally, the handicapped children enrolled in UTA differ from the general community in the Monroe-Woodbury district outside of the Village of Kiryas Joel.

10. The personal appearance of the handicapped children enrolled in UTA is different from the personal appearance of handicapped and non-handicapped children outside of the Village of Kiryas Joel in that:

(a) the boys all have long side curls (known as pais) which are never cut from infancy;

(b) the boys all wear head coverings called yarmulkes at all times, and from the age of 13 onward, wear a hat above the yarmulke;/

(c) the boys wear no pastel colors but only dark colors and white shirts;

(d) the boys are required to wear a fringed religious garment called tzitzis;

(e) boys are required to wear garments that cover their arms at least to the elbow and that cover their legs at least to the ankle;

(f) girls are required to wear garments that cover their arms at least to the wrist, and to wear dresses and skirts only that cover their legs to mid-calf;

(g) girls are required to wear thick stockings that are full length;

(h) girls are not allowed to wear pants or open-collared garments;

(i) girls are not permitted to wear their hair loosely, to wear makeup or nail polish or perfume.

11. As a matter of practice, neither boys nor girls participate in any team sports. As a matter of practice, boys and girls generally do not mix culturally or socially. Outside of the home boys and girls do not socialize together. Within the home only boys and girls of the same family socialize together, and even that relationship is limited.

12. A typical ten year old boy in the Village of Kiryas Joel would normally arise at approximately 6:30 a.m. and be in school at UTA by 7:30. He would remain in school till 6:00 p.m. in the evening at which time he would go home for dinner and return to school thereafter for an hour of evening studies at which time he would typically return home and go to bed. This routine is followed 5½ days a week, except for the Sabbath, which is spent in the Synagogue from 9:30 in the morning until 12:30. At that time the child would typically return home for lunch, followed by a rest period of approximately one or two hours, at which time the boy would resume his religious studies with his father until just prior to sundown. He would then return to the Synagogue with his father until approximately an hour and a half after sunset, at which time he would typically return home and go to bed. On the Sabbath, dinner is eaten in the Synagogue.

13. A typical ten year old girl would go to school 5 days a week from 8:30 in the morning until 4:00 in the afternoon. Upon her return home she would assist her mother with household chores and with care of younger siblings. The average family size in the Village of Kiryas Joel is approximately 10. Girls do socialize with other girls when their chores are completed. Boys also socialize but only with other boys. Neighbors are all of the same

cultural, social and religious background. There are no people living in the Village of Kiryas Joel other than Hassidic Jews.

14. Hassidic Jews have been classified by the United States Government Minority Business Development Act as socially disadvantaged, defined under the Act as those persons who have been subjected to cultural, racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. See Exhibit "A" annexed.

15. I personally know each of the children of the named defendants. Each of the children of the named defendants who are handicapped have been found to be handicapped by the Committee on the Handicapped of the Board pursuant to Article 89 of the New York State Education Law (Children with Handicapping Conditions) and Title 20 U.S.C. Section 1400 et seq. (Education of the Handicapped Act). The Board has admitted that each of these children is so handicapped and that each has handicapping conditions.

16. I am also familiar with all of the other handicapped children in the Village of whom 43 have already been determined by the Committee on the Handicapped of the Board to be so handicapped and to have such handicapping conditions. In addition, there are approximately 17 other severely handicapped children in Kiryas Joel who would, in my opinion, fall within the definition of handicapped children or children with handicapping conditions if examined by the Committee on the Handicapped of the Board. Annexed hereto as Exhibit "B" is a list of 60 names of handicapped children attending UTA.

An asterisk in the second column follows the name of each of the 43 children found to be handicapped by the Committee on the Handicapped of the Board.

17. After providing services to some of the handicapped children in the neutral site in the Village of Kiryas Joel, the Board suddenly changed its position after the end of the school year of 1984-1985. In fact, the Board led the parents to believe that all would continue as before. Some of the children were evaluated as requiring even greater services. Annexed as Exhibit "C" is a letter dated July 31, 1985 to Mr. and Mrs. Wieder which enclosed an amendment to Phase I of the Individualized Educational Program for their daughter Hudes. No warning was given that such services would not be resumed in the Fall until right before the start of the school year in the Fall of 1985. The first warnings were telephone calls to the parents of children who had received services during the prior school year and who had received notices during the summer similar to the ones sent to Mr. and Mrs. Wieder on July 31, 1985. I began to receive calls from parents telling me that the Board had advised that their children were not going to get services as they had previously gotten.

18. The gist of those phone calls was effectively to tell the parents that their children could not receive appropriate services since the Board would only give services in the regular classrooms of the public schools.

19. Special educaton [sic] and related services in the regular classes of public schools for these handicapped children is not appropraite [sic] special education and related services because of many factors including:

(a) many of these children required one-on-one services which could not be rendered in regular classes of the public schools or in any other regular classes (see, for example, Affidavit of Pamela Brewster, submitted herewith);

(b) those children who could receive benefits from services with other children could not receive such benefits where the surroundings in which such benefits were provided were socially and culturally unacceptable for the appropriate provision of services (see Affidavit of Abraham Wieder, submitted herewith);

(c) many of the handicapped children would suffer severe emotional and cultural shock were they uprooted from the mainstream of the community in which they reside;

(d) those handicapped children who had previously attempted to receive services outside of the Village of Kiryas Joel had been unable to continue to receive such services because of the inappropriateness of the social and cultural surroundings (see Affidavit of Abraham Wieder, submitted herewith).

20. None of the parents of the handicapped children consented to the change in the placement of their handicapped children unilaterally mandated by the Board.

* * *

Satmar

An Island in the City

BY

Israel Rubin

CHICAGO

Quadrangle Books

1972

Copy of "Satmar – An Island in the City" By Israel Rubin submitted as exhibit to Judge in connection with Class Certification Motion (pp. 272-412)

* * *

has an even wider following within Orthodoxy than its stand vis-a-vis Zionism. For example, many Orthodox institutes of higher learning have adopted during the last few decades a policy that forbids their students to attend college. The difficulty is that during the same two decades a college degree has become a prerequisite for decent employment. Can Orthodox Jews continue to ignore this reality? Aside from the occupational factor, can Orthodoxy allow itself to ignore developments in the world of Western learning at a time and in a place where Jews have become full citizens and presumably do not wish to return to a ghetto? One could even argue that the fear of being exposed to what others have to say is in itself an admission of lack of confidence in one's own

views. He who feels confident in his stance should logically not seek to avoid confrontation with challenging alternatives.

A final aspect of this problem is a concomitant of insulation, partly a justification for it – the need to maintain internally a negative image of the outside world. This frequently results in joining hands, implicitly, with radicals (both right and left, but especially on the right) who have an equally vested interest, albeit for different reasons, in maintaining such an image of contemporary Western society. Such an alliance is, to say the least, precarious, for these same elements have traditionally been the main carriers of anti-semitism.

Opponents of insulation have not yet worked out a formula for an acceptable mode of full participation. After all, a college environment is not exactly an Orthodox Jew's dream. To mention just one example, sexual freedom is incompatible with Orthodox Jewish living, and no one has yet figured out how to insulate Orthodox college students from the strong temptations available on the campus. Nor has anyone found a way to reconcile the attitude of free inquiry with the Orthodox demand for a degree of doctrinal rigidity. At least such reconciliation has not taken place on a wide scale. As in the case of Zionism, Orthodox Jews have dealt with this problem on a

* * *

Parts Two through Four describe the sociocultural system of Satmar by dissecting the culture into its institutional components. As used here, "institution" denotes a broad cultural area which centers on a set of individual

and collective needs. Such dissection obviously involves a degree of artificiality, since institutions overlap, and of arbitrariness, for numerous behavior patterns legitimately belong to more than one institution. Yet it is logical to regard food consumption, for example, as basically an economic rather than a religious activity (except, of course, in cases where religion dictates the consumptive act itself), even though religion may prescribe the avoidance of certain foods or ceremonial procedure before or after eating.

The religious institution is our logical starting point, since religion is at the root of the Satmarer Hasidim's effort to preserve their culture. Part Two, then, considers the basic belief system, the Rov and his central role, the social relationships that involve religion generally and directly, and behavior that is primarily religious, not an adjunct to nor an adornment of a secular act.

* * *

Finally, the continued existence of Satmar is seen to depend on the success of the school.

Within this broad framework are more specific norms, chief of which is the desideratum of learning Torah and teaching it to one's sons so that they too may be able to study and obey it. Supporting Torah study are several related norms which elevate the dignity of the teacher of Torah and even of the books that contain any form of Torah. These serve as the foundation for school discipline which is thus administered in the name of the revered subject matter.

Complementing such goals as Torah study are numerous prescriptions that are expected of the school, such as to tolerate no breach of any religious law, no profanities of any kind, no degree of open disrespect, or, in short, no behavior that threatens the community's self-imposed standards.

In the secular department of the boys' school and in the girls' school as a whole, there appears to be as yet no rationale other than the desire to comply somehow with the law and thus maintain the frequent claim to good citizenship and loyalty. Some expectations are beginning to emerge, however. For example, now that the English department exists anyway, many parents have begun to feel that this department ought to teach the boys the English language, for the parents themselves feel a need to learn it. Abroad the girls were permitted to attend public schools and many a parent began to display pride in a daughter's high grades, if for no other reason than as an indicator of the girl's "brightness." This same motivation continues to be apparent in the United States. As for the girls' Jewish studies department, a great deal of confusion about its purpose still existed a decade after its coming into being. Conservative elements which felt guilty about its presence have, at best, hoped that it will do no harm. The more liberal parents, however, have begun to feel that it may also be performing a positive service, namely, to teach the girls those essentials of

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during which any physical contacts is to be avoided. In fact, any public mention of the topic meets with disapproval.

In the realm of work, we recall the strong proscriptions regarding work on Saturday and major holidays, proscriptions that cannot be violated without automatic expulsion from the community. In addition, the culture encourages, though it does not strictly demand, full or partial refrain from work on numerous days of lesser significance.

Food regulations are equally extensive and strict. Not only are Satmarer – like all Orthodox Jews – required to follow certain procedures in the processing of meat and dairy products or Passover foods, but they follow these rules according to the strictest interpretations and hence limit their trust in these matters to members of their own or culturally similar communities.

Secular education beyond a rudimentary knowledge of the "three R's" is limited to occasional technical training, preferably outside the walls of institutes of higher learning. Colleges and universities are mysterious unknown territory and are thought to offer, along with some useful technical knowledge, instruction in heresy in an environment free of all moral restraints. A full college education is thus beyond the reach of any Satmar man or woman.

Finally, prestige in Satmar requires conformance to the semi-formal code governing outward appearance, which especially affects males. They wear beards, dangling sideburns, special hats, long dark coats, and, on Saturdays, a shtraamel and kaaftan. The result is, naturally, an unmistakable appearance which allows instant identification of a member of Satmar or a similar group.

The strains results from these regulations are numerous. In the case of sex life, it is rather obvious that from early childhood onward one must curb his temptation for any physical or social contact with a member of the opposite sex other than a spouse. Even in marital life, the extensive post-menstrual

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Affidavit of Dr. Daniel Alexander
Sworn to September 15, 1986 –
In Opposition to Motion and
In Support of Cross-Motion (pp. 110-148)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, Plaintiff, – against – ABRAHAM WIEDER, ISACK SILBERSTEIN, JOSEF HIRSCH, ITAMAR KAUFMAN and MOSES STERN, individually and as class representatives on behalf of others similarly situated, Defendants.	AFFIDAVIT IN OPPOSITION Index No. 7738/85 Assigned Justice: Irving A. Green

STATE OF NEW YORK)
) ss.:
COUNTY OF ORANGE)

DR. DANIEL ALEXANDER, being duly sworn, deposes and says:

1. I am Superintendent of School and Chief Executive Officer of plaintiff Board of education of the Monroe-Woodbury Central School District and am personally familiar with the facts and circumstances hereinafter set forth.

2. I submit the within affidavit in opposition to defendants' motion for preliminary injunctive and further relief and in support of plaintiff's cross-motion to dismiss the counterclaims of defendants for legal insufficiency and for judgment pursuant to the provisions of CPLR §3001 declaring that plaintiff Board of Education, in compliance with its obligation under federal and state law, may furnish the handicapped children residing within or proximate to the Village of Kiryas Joel who are attending private schools at the volition of their parents with special education and related services of an instructional, remedial and therapeutic nature only in the regular classes of the public schools and not separately from pupils regularly attending the public schools.

3. Annexed hereto and incorporated herein as Exhibits "A" through "C" respectively are plaintiff's Complaint, defendants' Answer and plaintiff's Reply thereto.

4. The Incorporated Village of Kiryas Joel lies within the boundaries of the Monroe-Woodbury Central School District.

5. Upon information and belief, the Village consists almost exclusively of members of the Orthodox Jewish community commonly known as Satmar Hasidim or Satmarer.

6. Upon information and belief, and as is more fully described in the undated affirmation of Menachem Friedman submitted in support of defendants' motion for preliminary injunctive and further relief and from a treatise entitled "Satmar-An Island in the City" by Israel Rubin, a copy of which was previously annexed to plaintiff's supplemental submission to the Court in connection with its motion for class certification, which Treatise is incorporated by reference herein, the Satmar Hasidim live an existence which is culturally and socially vastly distinct from that of the general community within the Monroe-Woodbury Central School District.

7. Upon information and belief, with extremely rare exceptions, the Satmarer do not send their children to the public schools of the District but choose instead to educate their children within the parochial schools of the Village.

8. Upon information and belief, the Satmarer within Kiryas Joel have organized the United Talmudic Academy of Kiryas Joel which includes Bais Rochel, a girls' school located within the Village; as more fully appears from the undated affirmation of Menachem Friedman, the United Talmudic Academy as a total enrollment in excess of three thousand students.

9. Upon information and belief, among the reasons for the refusal of the Satmarer to send their children to the public schools of the District are the existence of religious doctrines prohibiting the mixing of sexes, various curriculum-based distinctions which the religion dictates in connection with the selection of curriculum appropriate for male and for female students and the

preference for instruction in Yiddish rather than in English.

10. Upon information and belief, the underlying goals and objectives of the United Talmudic Academy differ radically from the goals and objectives of public educational systems.

11. The Rubin Treatise describes the foundation of the religious educational system in the following manner:

> "The underlying norm that serves as a foundation of and rationale for the educational system is the high value placed upon bringing up children who will continue to live by the religious standards of their parents. It is a value with individual, familial, and community dimensions. Individually, each person is under strict religious obligation to transfer the Torah heritage to his offspring. The fulfillment of this mizvah is taken to be among the main purposes of life on earth and even in the world to come, for the soul is believed to benefit from having left behind worthy children, whereas dying without this accomplishment is considered tragic . . .
>
> "Within this board framework, are more specific norms, chief of which is the desideratum of learning Torah and teaching it to one's sons so that they too may be able to study and obey it . . .
>
> * * *
>
> "In the secular department of the boys' school and in the girls' school as a whole, there appears to be as yet no rationale other than the desire to comply somehow with the law and

thus maintain the frequent claim to good citizenship and loyalty". (at Pages 138, 139)

12. As the Rubin Treatise indicates, upon information and belief, the Satmarer have not regarded their school as having any significant relationship to one's occupational role in adulthood; thus, an essential component of a public educational system to train students toward an occupational role is absent within the schools of the Village.

13. The Rubin Treatise summarizes:

> "In summary, the Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women. Only in a minor way do the Satmarer want their school as a place to receive knowledge that may one day be put to a practical use in earning money." (at Page 140)

14. Upon information and belief, it is readily apparent from the foregoing that the schools within the United Talmudic Academy are pervasively sectarian in atmosphere and in purpose and are designed to inculcate the religious values and beliefs of the Community, rather than to provide secular academic instruction.

15. Upon information and belief, it is further evident that what limited secular education which such schools provide goes hand in hand with the religious mission which is the primary and dominant reason for the schools' existence.

16. Upon information and belief, it is clearly settled that a parent has a right to withdraw his or her child from the public schools of a district and to educate that child in a private or parochial school of the parent's choice.

17. What is at issue herein is not the validity of defendants' decisions to decline to enroll their children in the public schools of the District but rather the legal consequences which flow therefrom.

PRELIMINARY ALLEGATIONS WITH RESPECT TO AVAILABILITY OF SERVICES TO NON-PUBLIC SCHOOL STUDENTS

18. Upon information and belief, it is a well-settled principle of law that a student fulfills his or her compulsory education law requirements either by attending a public school within the home school district or by attending a non-public school at the expense and volition of the parent.

19. Upon information and belief, the Education Law contains certain narrowly-defined exceptions to the premise that a child enrolled at the volition of his parent in a parochial school may not avail himself of the programs and services of the public school district.

20. Article 11, § 3 of the Constitution of the State of New York provides as follows:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or

> in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

21. Upon information and belief, subject to the constitutional limitation above-cited, boards of education have extremely limited authority to provide services to parochial school students.

22. Upon information and belief, Article 73 of the Education Law and, more particularly, § 3635 thereof, authorizes and requires provision of transportation from home to school of children attending public and non-public schools.

23. Upon information and belief, Section 912 of the Education Law authorizes and requires provision of "health" and "welfare" services, as the terms are therein defined, to all children, without regard to school affiliation.

24. Upon information and belief, Articles 15 and 16 of the Education Law authorize and require the lending of textbooks, text-substitutes and certain computer software programs of a non-denominational nature to pupils enrolled in public and in parochial schools.

25. Upon information and belief, Education Law § 3602-c provides a statutory procedure by which children enrolled in private or parochial schools may participate in

* * *

special education and related services to defendants except in accordance with the subject to the limitations contained in Education Law § 3602-c, subdivision 9, and defendants' counterclaims should be dismissed for legal insufficiency.

/s/ Daniel Alexander
DR. DANIEL ALEXANDER

Sworn to before me this
15th day of September, 1986.

/s/ Ilene E. Gilmore
Notary Public
ILENE E. GILMORE
Notary Public, State of New York
No. 4776274
Qualified in Orange County
Commission Expires 9/30/88

Affidavit of Philip R. Paterno
Sworn to September 16, 1986 –
In Opposition to Motion and
In Support of Cross-Motion (pp. 173-193)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, Plaintiff, – against – ABRAHAM WIEDER, ISACK SILBERSTEIN, JOSEF HIRSCH, ITAMAR KAUFMAN and MOSES STERN, individually and as class representatives on behalf of others similarly situated, Defendants.	AFFIDAVIT IN OPPOSITION Index No. 7738-85 Assigned Justice: Irving A. Green

STATE OF NEW YORK)
) ss.:
COUNTY OF ORANGE)

PHILIP R. PATERNO, being duly sworn, deposes and says:

1. I am Director of Pupil Personnel Services for the Board of Education of the Monroe-Woodbury Central School District and currently serve as Chairperson of the District's Committee on the Handicapped.

2. I have served in this capacity since in or about June, 1985.

3. I am permanently certified by the New York State Education Department to serve as a school district administrator and, in addition, I hold certification as a school psychologist and as a teacher.

4. I submit the within affidavit in support of plaintiff's motion for summary judgment and in opposition to defendants' motion for preliminary injunctive and further relief.

5. I am fully familiar with the facts and circumstances hereinafter set forth, both from my personal involvement therein and from my review of the educational records and related documents maintained by the District in the ordinary course of business.

6. Upon information and belief, I have read the affirmations of Menachem Friedman and Abraham Wieder and believe that they contain significant mistakes and distortions with respect to the relevant facts and circumstances concerning prior District attempts to provide programs and services to Satmar Hasidic children.

7. Upon information and belief, the District has been and continues to be ready and willing to provide special education and related services to the infant defendants, and no child has been denied or deprived of services to which he or she is entitled by virtue of the actions of the plaintiff herein.

8. Upon information and belief, substantial programs and services were offered and furnished to Satmar Hasidic children.

9. Upon information and belief, among the services extended were: (a) two hearing-impaired children were evaluated and fitted with auditory trainers; (b) three hearing-impaired children received daily remediation in the academics in addition to two sessions a week of individual speech therapy aided at improving their receptive and expressive skills, lip-reading skills and auditory training skills; (c) all children referred for speech were screened by a speech therapist, and fifteen were given speech therapy; (d) two teachers providing remediation to the hearing-impaired children were given one hour per week of consultative services from a certified teacher of the deaf in order to improve the effectiveness of their work with children; (e) two hearing-impaired children received two hours per week of services of a teacher of the deaf in addition to speech therapy; (f) a multiply handicapped child received two sessions of physical therapy and two sessions of occupational therapy per week; (g) another child was provided with occupational therapy; (h) another district employee was assigned to work with a group of Hasidic children on a weekly basis in a program designed to improve their gross and fine motor coordination; (i) a part-time speech therapist was hired to provide speech therapy to a greater number of students; (j) a school psychologist did numerous psychological evaluations on Hasidic children.

10. Upon information and belief, the contrary is true, since the adult defendants have engaged in a course of conduct pursuant to which they have made it impossible for the plaintiff District to fulfill its responsibilities in a manner consistent with statute and constitutional limitations.

11. Upon information and belief, I have reviewed the affidavit of Daniel Alexander sworn to the 15th day of September, 1986 and am in agreement with the assertions therein contained that the District has attempted to serve the needs of the infant defendants, and that any failure to receive such services was directly attributable to the intransigence of the adult defendants who have consistently refused to accept services in the manner proffered by plaintiff.

12. Upon information and belief, defendants allege that as a result of linguistic and cultural differences that their children cannot be educated in the regular classes of the public school.

13. Upon information and belief, past history and practice contains many illustrations to the contrary, where Hasidic children have adjusted satisfactorily to a public educational setting.

14. Upon information and belief, during the 1983-84 school year, five Hasidic students were enrolled by their parents in public school programs for the handicapped.

15. Upon information and belief, while many of these children were subsequently withdrawn from the program at the volition of their parents, such withdrawal was not because the programs had not been successful in accommodating the needs of such children but represented a parental choice to withdraw services from the students at that educational setting.

16. Upon information and belief, three Hasidic children were enrolled in the public schools or educated by

contract with the public schools, each of whom accepted services and remained throughout the entire school year.

17. Upon information and belief, during the 1985-86 school year, three Hasidic children were placed in the public schools or through contract with the public schools.

18. Upon information and belief, while two of the children were withdrawn from the program, it was not for lack of success of such programs in meeting the needs of the children but represented a parental choice to discontinue services.

19. Upon information and belief, I have reviewed progress reports and educational records of the public schools concerning the educational placement of the Satmar children within the public schools, have had discussions with classroom teachers and administrators, and have concluded therefrom that the students actually made direct and positive progress therein.

20. Upon information and belief, I served as Chairperson of the Committee on the Handicapped, commencing in June, 1985.

21. Upon information and belief, in my capacity as Chairperson of the Committee on the Handicapped, I conducted numerous annual reviews as to the status and programs of handicapped children in the district, including Satmar Hasidic children.

22. Upon information and belief, I am familiar with the past history of attempts to serve the needs of handicapped children at the annex to Bais Rochel and of the

fact that serious concerns were expressed with respect to the constitutionality of delivery of services threat.

23. Upon information and belief, in or about July, 1985, the District determined to discontinue provisions of services which were instructional, remedial or therapeutic at the annex to Bais Rochel.

24. Upon information and belief, such determination was compelled by the then contemporaneous decisions of the United States Supreme Court in the *Aguilar* and *Grand Rapids* cases, more fully discussed in the affidavit of Daniel Alexander sworn to September 15, 1986 and by the demand of the Satmarer for education, dual-enrollment, rather than health and welfare services.

25. Upon information and belief, during the preceding year, approximately forty-nine students received speech and language screening at the annex; fifteen students received speech improvement services; two students received occupational therapy; and one student received physical therapy.

26. Upon information and belief, services were neither withdrawn nor curtailed in connection with the determination to withdraw services from the annex to Bais Rochel and to provide the Satmar students with services in the regular classes of the public schools in accordance with law.

27. Upon information and belief, annexed hereto and incorporated herein as Exhibit "A" through "E" are the Minutes of the Meetings of the Committee on the

Handicapped in connection with Committee consideration of the annual reviews of the five individual infant defendants.

28. Upon information and belief, in no instance was the nature or level of services diminished, but, to the contrary, as in the case of Hudes Weider, in some instances services were actually enhanced or augmented.

29. The Committee on the Handicapped experienced continued frustration with the intransigent refusal of the Satmar Hasidim to accept programs or services in other than the annex to Bais Rochel.

30. As Chairperson of the Committee on the Handicapped, I directed my staff to reach out to the Hasidic Community to encourage acceptance of services and programs, but such attempts to secure voluntary cooperation met with at best extremely limited success and frustration.

31. Upon information and belief, in the overwhelming majority of instances, Hasidic parents declined to accept services, except upon terms and conditions which they sought to impose as the condition to receive such services.

32. Upon information and belief, Hasidic parents declined to attend meetings of the Committee on the Handicapped, declined to sign their student's Individual Education Plan, declined to attend scheduled meetings or conferences and refused to cooperate with the statutory operations or functions of the Committee.

33. Upon information and belief, I have reviewed those allegations of the counterclaim which allege that

the Committee deprived Hudes Wieder of programs and services to which she was entitled to under law and believe that there is no legal merit thereto.

* * *

technique for developing greater English-language facility among non-English speakers.

86. Upon information and belief, no Satmar Hasidic family has requested that their child be enrolled in a public bilingual program or an English-as-a-Second-Language program, but, to the contrary, the Satmarer have requested and demanded that all services for their children be provided in Yiddish as the primary language of instruction.

87. Upon information and belief, a public school may furnish programs and services only in the manner authorized or required by law.

88. Upon information and belief, a public school may not accommodate a parental request to dispense with the requirement that English be the language of instruction, other than in a bilingual or English as a second language program designed to facilitate the English speaking ability of non-English speaking students, lest students be separated and segregated by native language.

89. Upon information and belief, the adult defendants further suggest that the Committee has been insensitive to the language issue at the level of the Committee on the Handicapped.

90 Upon information and belief, annexed hereto and incorporated herein collectively as Exhibit "K" are

copies of the various Committee on the Handicapped forms, which forms are written in both English and in Yiddish.

91. Upon information and belief, the Committee has indicated the availability of a Yiddish-English translator, should any parent be unable to communicate in the English language at a meeting of the Committee on the Handicapped.

92. Upon information and belief, I join in plaintiff's motion for judgment construing the statute in the manner set forth in plaintiff's prayer for relief and in its demand for judgment dismissing the counterclaims for legal insufficiency.

/s/ Philip R. Paterno
PHILIP R. PATERNO

Sworn to before me this
16th day of September, 1986.

/s/ Ilene E. Gilmore
Notary Public
ILENE E. GILMORE
Notary Public, State of New York
No. 4776274
Qualified in Orange County
Commission Expires 9/30/88

The University of
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The State Education Department
Instruction and Program
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44-12-02-02-0000

KIRYAS JOEL VILLAGE UFSD
C/O-SUPRTNDENT-DR STEVEN BENARDO
500 FOREST RD
MONROE NY 10950

COMPLETED

FORM ST-3
ANNUAL FINANCIAL REPORT
BASED ON DOUBLE-ENTRY ACCOUNTING
FISCAL YEAR ENDED JUNE 30, 1993

Name of School District Kiryas Joel Village Union Free School District County Orange Supervisory District____

FILING INSTRUCTIONS (ALL DISTRICTS EXCEPT NEW YORK CITY)

Each district (except New York City) should produce two photocopies (except where noted) of this report before **September 1, 1993** and transmit as follows:

(1) **The signed original** mailed to the Regional Information Center for processing;

(2) One **photocopy** mailed directly to the Office of the State Comptroller, Bureau of Municipal Research and Statistics, Alfred E.

Smith Office Building, 10th Floor, Albany, NY 12236;

(3) One **photocopy** mailed to the BOCES District Superintendent of the BOCES of location (not applicable to non-component district).

CERTIFICATION

This report should be certified by the district treasurer except:

(1) in a financially dependent school district (Buffalo, Rochester, Syracuse, Yonkers, and New York City) by the chief fiscal officer;

(2) in a common school district which does not have a treasurer, by the sole trustee of chairperson of the Board of Education.

I,_____ certify that this report, to the best of my knowledge, upon information and belief, is a true and correct statement of the financial transactions of the school district for the fiscal year ended June 30, 1993.

Signed:/s/ _____
Date _____
Title: Treasurer (or) _____
RECEIVED

Oct 25, 1993

BUREAU OF
MUNICIPAL RESEARCH

Schedule A3
(Continued)

GENERAL FUND - REVENUES
FISCAL YEAR ENDED JUNE 30, 1993

NAME OF ACCOUNT	ACCOUNT CODE	DP CODE 48	REVENUES
Miscellaneous			
Refund of Prior Years Expenditures:			
a. Refund for BOCES Services Approved for Aid	A2701	59	$
b. Refund of Transportation Expenditures	A2702	60	
c. Refunds, Other (Specify) _____	A2703	61	78
Gifts and Donations	A2705	62	
Other Unclassified Revenues (Specify) _____			
_____	A2770	63	
Total Miscellaneous	AT2799	64	$ 78
Interfund Revenues			
Interfund Revenues	A2801	65	$- 21,398
State Aid			
Loss of Public Utility Valuation	A3017	66	$
Records Management	A3060	67	
Basic Formula Aid (See Instruction Manual)	A3101	68	391,241
Lottery Aid	A3102	69	
Boards of Cooperative Education Services	A3103	70	2,643
Tuition and Transportation for Students with Disabilities (Chapters 47, 66 and 721)	A3104	71	
Textbook Aid (including Textbook/Lottery Aid)	A3260	72	81,494
Special Aid for Small City School Districts	A3261	73	
Computer Software Aid	A3262	74	9,096
Library A/V Loan Program Aid	A3263	75	12,267
Other State Aid (See Instruction Manual)_____			
_____	A3289	76	
Youth Programs	A3820	77	
Total State Aid	AT3999	78	$ 496,741

App. 35